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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I" Societa Nazionale di Navigazione, Claimant,

Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

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HENRY N. LONGLEY,
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On the Brief.

INDEX.

PAGE

Statement 1

POINT I—Clause 11 of the petitioner's bill of lading is invalid because it violates the express terms of the Harter Act 4

POINT II—Clause 11 of the petitioner's bill of lading is unreasonable and void as against public policy. 6

POINT III—Even a reasonable valuation clause is invalid unless the shipper has the alternative of shipping without limitation as to value in consideration of a higher rate of freight 14

POINT IV—The question presented here is not one of degree. The contract upon which the petitioner relies is lacking in the element of free choice which this Court has held essential to such agreements 27

POINT V—The decree of the Circuit Court of Appeals should be affirmed 31

TABLE OF CASES CITED:

A. C. Lawrence Leather Co. v. *Compagnie Generale Transatlantique*, 18 Fed. (2d) 930 (C. C. A. 2nd Cir.) 17

Adams Express Co. v. *Croninger*, 226 U. S. 491, 509-10 ..... 7, 17

Amer. Ry. Exp. Co. v. *Lindenburg*, 260 U. S. 584, 592. 17

Asuarca, The, 13 Fed. (2d) 222..... 23

Bank of Kentucky v. *Adams Express*, 93 U. S. 474.. 15

Boston & Maine R. R. v. *Piper*, 246 U. S. 439, 445...8, 17

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272..... 8

Caledonier, The, 42 Fed. (2d) 856 (C. C. A. 2nd Cir.) 17

Cau v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430, 431 15

PAGE

Chicago, etc. R. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 99 ..... 20, 21

Clark v. Barnwell, 53 U. S. 272 15

Denver & R. G. R. Co. v. Peterson Grocery Co., 59 Colo. 125 24

Duplan Silk Co. v. Lehigh Valley R. R. Co., 223 Fed. 000 21

Express Co. v. Caldwell, 21 Wall. 264 15

Ft. Worth & D. C. Ry. Co. v. Greathouse, 17 S. W. 834, 837 (Sup. Ct. Texas) 23

Gulf, Colorado, etc. Ry. v. Texas Packing Co., 244 U. S. 31 ..... 13, 22

Hart v. Pa. R. R., 112 U. S. 331 16

Illinois Central R. Co. v. Bogard, 27 So. 879, 880 (Sup. Ct. Miss.) 23

Inman & Co. v. Seaboard Air Line R. Co., 159 Fed. 960, 968 22

Jason, The, 225 U. S. 32, 49 6

Kansas Southern Ry. Co. v. Carl, 227 U. S. 639, 650 .. 7

Kensington, The, 183 U. S. 263 8

Kilthan v. Int. Mercantile Marine Co., 245 N. Y. 361 ..... 25, 26, 27

Knott v. Botany Mills, 179 U. S. 69, 71 6

Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 438-9 6

Meranke, The, 31 Fed. (2d) 974, 975 (C. C. A. 2nd Cir.) 6, 23, 26

Moore v. Duncan, 237 Fed. Rep. 780 11

New York, etc., R. Co. v. Estill, 147 U. S. 591, 616-17 .. 6

Oneida, The, 128 Fed. 687, 689 22

Pearse v. Quebec Steam-Ship Co., 24 Fed. Rep. 285 .. 12, 13

Pa. R. R. Co. v. Olivit Bros., 243 U. S. 574 22

PAGE

Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U. S. 312.....15, 22

Queen of the Pacific, 180 U. S. 49..... 15

Railroad Co. v. Lockwood, 17 Wall. 357, 384, 6, 7, 15, 28, 29, 30

Railroad Co. v. Pratt, 22 Wall. 123..... 15

Rhymer v. D. L. & W. R. R. Co., 27 Pa. Super. Ct. Rep. 345, 347 (Super. Ct. Pa.)..... 23

Ruppel v. Allegheny Valley R. R. Co., 167 Pa. 166, 31 Atl. Rep. 478.....9, 24, 28

St. Johns N. F. Shipping Corp. v. Companhia Geral, etc., 263 U. S. 119, 125..... 6

St. Louis, Iron Mt. & S. Ry. Co. v. Coolidge, 83 S. W., 333, 335 (Sup. Ct. Ark.)..... 23

So. Pac. Co. v. D'Arcais, 61 S. W. Rep. 813, 14 (Ct. Civ. App. Texas)..... 23

Springfield Light, Heat & Power Co. v. Norfolk & W. Ry. Co., 260 Fed. 254, 257, 261.....22, 23

Straus & Co. v. Can. Pac. Ry. Co., 254 N. Y. 407, 24, 25, 26, 27

Union Pacific Railroad Co. v. Burke, 255 U. S. 317, 18, 19, 21, 30

York Company v. Central Railroad, 3 Wall. 107..... 15

OTHER AUTHORITY CITED:

Harter Act, Section 1 (Act of February 13, 1893); U. S. Code, Title 46, Sec. 190.....4, 5, 14

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Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

The opinion of the Circuit Court of Appeals (R., pp. 193-197) is reported in 73 F. (2d) 40. The opinion of the District Court (R., pp. 180-185) is reported in 3 F. Supp. 579.

STATEMENT

This proceeding was begun in the Southern District of New York by the filing of a libel *in rem* against the Steamship "Ansaldo San Giorgio I" for damage to three shipments consisting of 4266 barrels of cherries in brine, carried on that vessel from Italian ports to ports in the United States, consigned to this respondent. The trial in the District Court resulted in an interlocutory decree for the libellant (this respondent). That decree was based on an opinion in which it was found that the damage resulted from bad stowage (O. R., pp. 157-8; 1928 A. M. C. 109).* On appeal from this interlocutory decree the

* We shall follow the petitioner's method of using the letter (R.) to indicate references to the record in this proceeding; and the letters (O. R.) to indicate references to the record in the earlier proceeding on the merits, which record constitutes Exhibit 3 in this proceeding (R., p. 6). See footnote on page 1 of petitioner's brief.

Circuit Court of Appeals affirmed the decision of the District Court without opinion (26 Fed. (2nd) 1016). The shipowner (petitioner here) petitioned for a writ of *certiorari*, which was denied by this Court (278 U. S. 633).

The case was then referred to a commissioner to ascertain and compute the recoverable damages. After lengthy proceedings the commissioner found that the containers and the cherries in brine contained in them, were in good order and condition when delivered to the petitioner's vessel at the ports of shipment in Italy. He also found that, upon discharge of the cherries at the ports of destination, 162 barrels had become a total loss and that there was additional damage equivalent to the loss of 419 barrels, or a total loss to the libellant of 581 barrels. The evidence was that about one quarter of the barrels were damaged, and

> "that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity of cherries, and broken and crushed barrel staves were found lying on the floor of the compartment" (Report of Commissioner, R., p. 170).

A considerable number of barrels were wholly missing (R., p. 176).

The commissioner determined the market value of the cherries on the date of arrival, and found that the libellant's damages, exclusive of interest, totaled the sum of $17,075.42. He also found that the libellant was entitled to interest, computed to October 17, 1932, in the sum of $8,931.57. The total damages found by the commissioner, therefore, including interest to the date of his report, was the sum of $26,006.99.

One of the grounds of defense upon which the petitioner relied in the proceedings before the commissioner, was clause 11 of the bill of lading, which reads as follows:

> "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred."

The commissioner held that this clause was invalid because there was no evidence that the shipper was given a choice of rates by the carrier (R., pp. 172-3).

Exceptions were filed by the claimant (petitioner here) to the commissioner's report, and were argued before Judge Patterson on January 30, 1923. He sustained the commissioner's findings of fact in all respects but found that clause 11 of the bill of lading was valid and that under that clause the libellant could recover nothing, although it was established that the libellant had sustained an actual loss of 581 barrels of cherries, having a value of $17,075.42, and that this loss resulted from the carrier's negligence in the stowage of the cargo.

The basis of this decision was that, owing to favorable market conditions prevailing at destination, the total market value of the merchandise which remained in specie, taking the sound and damaged together, exceeded the values stated in the invoices under which the goods were shipped. Under these circumstances the District Court ordered that the libel be dismissed (R. 187).

The opinion of the District Court sustaining the exceptions to the commissioner's report (R. 180-185) is reported in 3 F. Supp. 579.

This respondent (libellant) appealed to the Cir-

cuit Court of Appeals, which reversed the judgment of the District Court and ordered that a decree enter in favor of this respondent (libellant) in accordance with the commissioner's report (R. 198; 73 F. (2d) 40).

The basis of the decision of the Circuit Court of Appeals was that clause 11 was unreasonable in that it required the damages to be fixed on the basis of the "invoice value of the *entire shipment*", instead of on the invoice value of the portion that was damaged. That court found it unnecessary to decide, and did not decide, whether a clause fixing the damages on the basis of the invoice value of the goods damaged would have been valid without giving the shipper the alternative of declaring the true value and paying a higher rate of freight.

The sole issue in this Court is the validity of clause 11 of the bill of lading quoted above.

POINT I.

Clause 11 of the petitioner's bill of lading is invalid because it violates the express terms of the Harter Act.

Section 1 of the Harter Act (Act of February 13th, 1893); U. S. Code, Title 46, Sec. 190, is as follows:

> "§190. *Stipulations relieving from liability for negligence.* It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper

> loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect" (Feb. 13, 1893, c. 105, §1, 27 Stat. 445).

In the present case it is no longer disputed that respondent's property, while in the custody of the petitioner as a common carrier (O. R., pp. 2 and 7), was in part totally destroyed and in part physically damaged, whereby the respondent sustained an actual commercial loss of upwards of $17,000. It is contended that clause 11 of the bill of lading completely exonerates the petitioner from any liability whatever in respect of this loss. Under these circumstances it seems clear that the result attributed to the clause in question is expressly and specifically prohibited by the statute. The statute provides that *it shall not be lawful for the master or owner of any* vessel "to insert in any bill of lading * * * any clause * * * whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence * * * in proper * * * stowage * * * of any and all lawful merchandise or property committed to its or their charge".

The petitioner relies upon clause 11 of its bill of lading as relieving it from any liability for the loss sustained by the respondent through the negligent stowage of its property. Possibly human ingenuity could devise a form of words which would forbid such a result more clearly than the language above quoted from the Harter Act; but we doubt whether this could be accomplished without departing from the brevity which is usual and desirable in statutory enactments.

In this aspect of the case we rest our argument on the language of the statute.

POINT II.

Clause 11 of the petitioner's bill of lading is unreasonable and void as against public policy.

A common carrier cannot, by contractual provision, escape liability for damage to merchandise resulting from its negligence.

> *Railroad Co. v. Lockwood*, 17 Wall. 357, 384;
> *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438-9;
> *Knott v. Botany Mills*, 179 U. S. 69, 71;
> *The Jason*, 225 U. S. 32, 49.

In the absence of any valid stipulation limiting its liability, a carrier's liability for loss of or damage to goods is measured by the market value of the goods at the port of destination on the date when they should have arrived.

> *St. Johns N. F. Shipping Corp. v. Companhia Geral, etc.*, 263 U. S. 119, 125;
> *New York, etc. R. Co. v. Estill*, 147 U. S. 591, 616-17;
> *The Meranke*, 31 Fed. (2d) 974, 975 (C. C. A. 2nd Cir.).

In the present case the respondent suffered an actual loss of over $17,000 computed by deducting from the sound value at destination of the damaged merchandise, the value of the merchandise in its damaged condition.

The petitioner contends that under clause 11 of the bill of lading, the carrier is relieved of all lia-

bility for this loss caused by its own negligence. A provision which can bring about such a result cannot, we submit, be accurately described as one providing a method of adjusting damages or as a provision which "furnishes a ready and convenient standard for measuring the loss" (Opinion of District Court, R. 183).

In *Railroad Company* v. *Lockwood*, *supra*, this Court announced the following conclusion:

> "That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants" (p. 384).

This Court has strictly adhered to that conclusion and has frequently restated it in later cases:

> "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary" (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509).

> "An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration" (*Kansas Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 650).

> "In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused

> by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence" (*Boston & Maine R. R.* v. *Piper*, 246 U. S. 439, 445).

See also,

Calderon v. *Atlas S. S. Co.*, 170 U. S. 272.

The public policy of this country is directed at results and not at methods. It is immaterial what form of words is employed to produce the forbidden result.

Indirect attempts have sometimes been made by ocean carriers to exempt themselves from liability for loss due to their negligence by providing that all questions arising under a bill of lading shall be determined by a specified foreign law under which the exemption sought is valid. This Court has, on grounds of public policy, held void such indirect attempts to do what cannot be accomplished directly. *The Kensington*, 183 U. S. 263.

Likewise in the *Piper* case, *supra*, the bill of lading provision was innocent enough on its face; it merely provided that the damages due to delay in the transportation of livestock should be measured by the amount which the shipper actually expended for food and water during the period of detention. Nevertheless, this Court declared the clause void as an attempt to protect the carrier from liability for his own negligence.

In the present case the result of clause 11 is that the carrier may negligently lose or destroy a portion of the property entrusted to its care without any liability whatever, so long as the portion which remains has a value at destination equal to the invoice value of the entire shipment.

In considering the effect of this clause, it must be borne in mind that much of the world's commerce moves under contracts made long in advance. The contract price of goods shipped today may have been fixed six months or a year ago. The invoice price naturally will be in accordance with the contract, and may have very little relation to prices obtaining either at the port of shipment or the port of destination on the date of shipment or arrival. It is clear, however, that the clause will normally operate in favor of the carrier. This was pointed out by the Supreme Court of the State of Pennsylvania in *Rupped* v. *Allegheny Valley R. R. Co.*, 167 Pa. 166; 31 Atl. Rep. 478. There the bill of lading provided that loss or damage to merchandise

> "shall be computed at the value of the property at the place and time of shipment under this bill of lading unless a lower value has been agreed upon."

The court said (p. 480):

> "How is the loss to be measured? The contract stipulates that the market price of the potatoes at Pittsburgh at date of shipment is to be the measure of damages."
>
> * * * * * * * *
>
> "This stipulation, it is urged, is not to relieve the carrier from any liability for negligence, but was adopted to avoid the uncertainty

which would otherwise be incident to proper proof of loss. If this were the object of the stipulation, there is no public policy which would avoid it. *The trouble with this view, however, is that the condition is palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate, and domestic trade. Railroads and all other common carriers would have but lean incomes if this were not so. The plain effect of it is not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it,—a reduction in the real loss. It is therefore void.*" (Italics ours.)

Even the petitioner's argument that the bill of lading will occasionally operate in favor of the consignee is open to grave question. In a time of falling prices it is scarcely to be assumed that carriers would issue a bill of lading in this form. There is no regulating body (such as the Interstate Commerce Commission) which forces ocean carriers to adhere to any particular form of bill of lading for any particular period of time. So far as the record shows, the petitioner may never have issued another bill of lading like those involved here; and it may never issue another. Under these circumstances we submit that this case should be considered from the standpoint of the operation of these bills of lading under the circumstances of this particular case; and not from the standpoint of the possible operation of similar bills of lading in some other case where the circumstances are different. There may never be such a case.

The fantastic results of clause 11 are readily apparent. If a shipment is worth one-third more at destination than at the port of shipment, the carrier may negligently destroy one-quarter of it without any liability whatever. He will enjoy a similar immunity even if his servants steal one-quarter of the goods. *Moore* v. *Duncan*, 237 Fed. Rep. 780.

The supposed benefits to the consignee would arise only in a time of rapidly falling prices. If we accept the petitioner's assumption that carriers would issue this form of bill of lading in such a period, they might, of course, be liable for enormous sums by reason of the most trivial damage. For purposes of illustration we may take the sudden collapse in the sugar market which occurred after the Great War, at a time when the previous high price had started shipments to this country from South America and the Far East. Let us assume that a bill of lading like the one involved here was issued for a cargo of 5,000 tons of sugar to be transported from Java to the United States. Let us assume that the cargo consisted of 100,000 bags weighing 100 pounds each; that all of the sugar was delivered in perfect condition, excepting that one bag was negligently dropped overboard in discharging; that during the voyage the price of sugar had declined from 20c per pound to 5c per pound. The actual loss to the consignee would be $5.00; but the carrier would be liable, under the terms of the bill of lading, for $1,500,000. Can it be argued seriously that carriers will assume any such liability; or that this is the sort of "consideration" which a shipper can be compelled to accept for waiving his right to recover his real damages? The question naturally arises what security the carriers offer for the performance of this remarkable obligation. By no means all carriers are able to respond for the large

sums which might be involved; and the question may well be raised whether their corporate powers are broad enough to permit such a contract. A further question arises whether such a contract would be enforceable in admiralty; and whether it would give a maritime lien on the vessel.

The foregoing is submitted in answer to the petitioner's argument as to the fairness and reasonableness of the clause. We submit, however, that the true answer to that argument is that no carrier would issue this type of bill of lading for a long voyage with cargo of unstable value. The best evidence of this is the fact that the reports contain no record of any litigation in which any such claim has been asserted against a carrier.

We know of no authority which sustains a clause like the present. Indeed, we have found no case where such a clause has even been considered. In *Pearse* v. *Quebec Steam-Ship Co.*, 24 Fed. Rep. 285, the bill of lading provided that "in case of damage, loss, or non-delivery, the ship-owners will not be liable for more than the invoice value of the goods". The shipowner contended that the "invoice value" referred to in this clause was the invoice value of the entire shipment, including the undamaged portion. Judge Addison Brown held that this was not the meaning of the clause; and that if so construed it would be void as against public policy. We quote from his opinion as follows:

> "The respondents contend that the stipulation of the bill of lading should be construed as limiting their responsibility to the invoice value of the shipment as a whole; and that the carriers are not to be liable for any loss or damage, provided the shipper ultimately real-

> izes at the port of destination the whole invoice value. Upon that theory the respondents in this case would not be liable at all, because the owner has realized upon the whole shipment considerably more than the invoice value of the whole, notwithstanding the damage to three of the fourteen bales" (p. 287).
>
> * * * * * * * *
>
> "When it is stipulated that in case of damage or loss, the ship-owner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only; otherwise the clause would not be valid. The law makes the carrier liable for the loss or damage of *any* goods through his own negligence. Any stipulation that would annul this liability is void" (p. 288).

In the *Pearse* case, the shipowner sought to do what the petitioner seeks to do here, *i. e.*, to off-set against any loss on damaged goods the amount of any profit which the consignee may have realized on sound goods. Judge Brown ruled that an agreement which would have this effect would be unlawful. In the fifty years which have intervened since that decision, the petitioner seems to be the first shipowner to challenge Judge Brown's statement of the law.

The petitioner's argument that its position is supported by the decision of this Court in *Gulf, Colorado, etc. Ry.* v. *Texas Packing Co.*, and by certain decisions of the Circuit Court of Appeals for the Second Circuit, is sufficiently answered in the opinion of the latter court in this case (R., p. 197). As to the *Gulf, Colorado* case, see also, *infra*, page 22.

POINT III.

Even a reasonable valuation clause is invalid unless the shipper has the alternative of shipping without limitation as to value in consideration of a higher rate of freight.

Heretofore, we have considered clause 11 from the standpoint of its reasonableness. Our argument has been that even if this clause had been accepted by the shipper voluntarily, in the exercise of a free choice between accepting this clause or having it eliminated in consideration of a higher freight rate, the clause would still be invalid because it produces an effect forbidden by law,—*i. e.*, it wholly exempts a common carrier from liability for a loss caused by his negligence.

We shall now discuss the clause in a different aspect. We shall now point out that even if the clause could be regarded as a reasonable method of placing an agreed valuation on the respondent's merchandise, it would still be invalid unless supported by a choice of rates.

At the outset we desire to define the precise scope of our argument. Many of the cases cited by the petitioner have no bearing whatever on the issue presented here. In the interest of brevity we shall not discuss these cases individually, but shall point out, by classes, why they are irrelevant.

We may first eliminate all cases which do not involve negligence. Both the Harter Act and the public policy of this country are limited to cases in which the carrier seeks exemption from his own negligence or that of his servants. There has never been any statute or public policy which prevented a carrier

from stipulating for exemption from liability for damage by fire, sea perils and other losses to which his negligence did not contribute. This is clearly pointed out in the opinion of this Court in *Railroad Co.* v. *Lockwood*, 17 Wallace 357, at pages 379-380. This distinction eliminates the following cases cited by the petitioner:

> *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 430, 431;
> *Clark* v. *Barnwell*, 53 U. S. 272;
> *York Company* v. *Central Railroad*, 3 Wall. 107;
> *Bank of Kentucky* v. *Adams Express*, 93 U. S. 174;
> *Railroad Co.* v. *Pratt*, 22 Wall. 123.

Even where the loss is due to the carrier's negligence, this Court has held that certain classes of stipulations do not tend to exempt the carrier from liability for such negligence and, therefore, are valid without special consideration. Thus, the carrier may stipulate for the benefit of any insurance effected upon the goods, *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U. S. 312; and may require notice of claim to be filed within a reasonable fixed period, *Express Co.* v. *Caldwell*, 21 Wall. 264; *Queen of the Pacific*, 180 U. S. 49.

Clauses fixing a conventional valuation or limitation upon the value of the goods carried have been the subject of frequent consideration by this Court. A very definite rule has been laid down with respect to such clauses. The rule is that where the assured has a free choice in the matter and agrees to a conventional valuation in consideration of a lower rate of freight, the clause will be upheld on the ground

of estoppel; otherwise such clauses are invalid. We believe that few rules have been more clearly stated and more firmly established in this Court than the foregoing.

One of the early statements of the rule is found in *Hart* v. *Pa. R. R.*, 112 U. S. 331. In that case this Court said:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value" (p. 340).
>
> * * * * * * * *
>
> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire* v. *New York Central R. R. Co.*, 98 Mass. 239, 245, and cases there cited" (p. 343).

It will be observed from the foregoing quotation that the validity of the valuation clause is based on the principle of estoppel. This Court and the lower Federal courts have repeatedly pointed out that this is the essential ground upon which such clauses are sustained. As the carrier has afforded the shipper a choice of two rates, and the shipper has chosen the lower rate, based upon his representation that his merchandise is worth but a limited amount and an agreement that the carrier's liability shall be limited to that sum, the shipper is estopped to set up that his goods are worth more than he has declared they were worth. It is particularly to be noted that the estoppel is the representation by the shipper concerning the value of his merchandise and his choice of a freight rate based on the value represented.

Adams Express Co. v. *Croninger,* 226 U. S. 491, 509-10;

Boston & Maine R. R. v. *Piper,* 246 U. S. 439, 443-5;

Amer. Ry. Exp. Co. v. *Lindenburg,* 260 U. S. 584, 592;

A. C. Lawrence Leather Co. v. *Compagnie Generale Transatlantique,* 18 Fed. (2d) 930 (C. C. A. 2nd Cir.);

The Caledonier, 42 Fed. (2d) 856 (C. C. A. 2nd Cir.).

With respect to these and similar authorities, the petitioner says:

> "While it is true that in most of those cases clauses limiting liability to a stated value were held to be valid where the shipper had the option to ship under a rate preserving the un-

> limited common law liability of the carrier, we do not believe that the process of reasoning by which this Court arrived at its determination sustaining such a limitation under such circumstances justifies a conclusion that such an alternative was laid down as a condition for sustaining it" (Petitioner's Brief, pp. 14-15).

This same argument was made to this Court some fifteen years ago in almost identical terms, in the case of *Union Pacific Railroad Co.* v. *Burke*, 255 U. S. 317. After stating the petitioner's argument and rejecting it, the opinion in that case restates in the clearest terms the rule that valuation clauses in bills of lading issued by common carriers are valid only where the rate is "tied to the release". Following an explanation of the theory on which valuation clauses have been sustained, this Court said:

> "The petitioner admits all this, but contends that it has never been held by this Court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.
>
> "With this contention we cannot agree.
>
> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice

of rates was given—where 'the rate was tied to the release' " (255 U. S. p. 321).

* * * * * * * *

"Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception" (255 U. S. pp. 322-3).

In view of the striking parallel between the argument of the petitioner in this case and the argument of the petitioner in the *Burke* case, we cite the language of this Court, above quoted, as our answer to this argument.

In answer to the petitioner's attempted distinction based on the argument that clause 11 is not a limitation of liability but a valuation agreement, we call attention to the repeated use of the phrase "valuation agreements" in the above quotation.

At this point in our argument it becomes necessary to distinguish another class of cases upon which the petitioner relies. These are cases in this Court and the lower Federal courts involving railroad bills of lading. We think it will be found that in most if not all of such cases the tariffs afforded the shipper an alternative rate of freight, under which the carrier's liability would be unlimited. So far as our experience goes, such a provision has been included in practically all railroad tariffs filed during the last twenty years. We have not searched the original tariffs in all the cases to which the petitioner refers, but we have ascertained the facts in two cases which we believe are typical.

The petitioner quotes the following passage from the opinion of this Court in *Chicago, etc. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99:

> "'We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it *does not necessarily prevent a recovery of the full actual loss,* and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule.' (Italics supplied.)" (Petitioner's Brief, p. 12.)

This language is quoted as supporting the petitioner's argument that no choice of rates need be given to support the validity of a true valuation clause as distinguished from a clause merely limiting the carrier's liability.

In the *McCaull-Dinsmore* case, the bill of lading provided that any loss or damage should be computed "on the basis of the value of the property at the place and time of shipment"; it did not provide for computing damages on the value of the "entire shipment", as in the present case. In this branch of our argument, however, the important point about the case is that the shipper actually had a choice of rates. We have examined the record in the *McCaull-Dinsmore* case and quote as follows from the stipulation of facts on which that case was submitted:

> "That said contract was a part of the published tariffs legally published and filed with the Interstate Commerce Commission; that said tariffs provided, among other things, a rate of transportation based on and controlled by said bill of lading or contract; *and said tariff fur-*

> *ther provided that in cases where the shipper was not agreeable to shipping under the terms of said contract or bill of lading, then a higher rate of transportation was provided by said tariffs.*" (Italics ours.)

From the foregoing it is apparent that the remarks of this Court in the *McCaull-Dinsmore* case are in no way inconsistent with the rule laid down in *Union Pacific R. R. Co.* v. *Burke*. The Court was discussing a case in which a choice of rates was given. On that assumption this Court agreed that the clause was not unreasonable and was only void because in violation of the Cummins Amendment.

The petitioner also cites the case of *Duplan Silk Co.* v. *Lehigh Valley R. R. Co.*, 223 Fed. 600. The record in that case includes the carrier's tariff, which contained the following language:

> "In order that the consignor may have the option of shipping property, either subject to the terms and conditions of the Uniform Bill of Lading hereinafter set forth or under the liability imposed upon common carriers by the common law and the federal and state statutes applicable thereto, this official classification provides for different rates and for different forms of Bills of Lading to be used, respectively, as the consignor may elect to have a limited liability or a common carrier's liability service."

The tariff also provided that if a shipper elected not to ship under the Uniform Bill of Lading, the merchandise

> "will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of the several states in so far as they apply."

We are satisfied that similar tariff provisions existed in almost all cases involving railroad transportation during the last twenty years, and the decisions in such cases must be read against that background. Accordingly, they have no bearing on the question now under discussion, *i. e.*, the necessity for a choice of rates to support the validity of a valuation clause.

A number of the cases which petitioner cites are distinguishable also on another ground, namely, that the validity of the valuation clause was not in question. In these cases both parties were satisfied with the clause and the court, therefore, did not pass on its validity. In this class are the following cases:

> *Pa. R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574;
> *Phoenix Insurance Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 322;
> *Gulf, Colorado etc. Ry.* v. *Texas Packing Co.*, 244 U. S. 31;
> *The Oneida*, 128 Fed. 687, 689.

In the case of *The Oneida*, the court said, at page 689:

> "The commissioner commenced his computation by fixing the value of the cotton at the amount stated in the invoice. Both parties appear to be content with this basis of computation, at least there is no exception challenging its accuracy."

The District Court cited several decisions in the lower Federal courts which we think are clearly distinguishable. In *Inman & Co.* v. *Seaboard Air Line R. Co.*, 159 Fed. 960, 968, and *Springfield Light, Heat & Power Co.* v. *Norfolk & W. Ry. Co.*, 260 Fed. 254,

257, 261, the opinions indicate that there was in fact a choice of rates.

In *The Asuarca*, 13 Fed. (2d) 222, the bill of lading provision was that the carrier

> "shall only be obliged to indemnify * * * for actual and intrinsic value of goods loaded, ascertained from invoices of origin * * *" (p. 233).

We think this language constitutes a mere limitation of the carrier's liability, and, hence, the decision in the *Asuarca* must be regarded as overruled by the later decision of the Circuit Court of Appeals for the Second Circuit in *The Merauke*, 31 Fed. (2d) 974.

In dealing with a question which has been so definitely and repeatedly decided by this Court, we deem it unnecessary to discuss in detail the decisions of the State Courts. The fact is that there is a definite conflict between the decisions in the various States. The following cases hold that a valuation clause based on invoice value or market value at point of shipment is invalid, at least where no choice of rates is given:

St. Louis, Iron Mt. & S. Ry. Co. v. *Coolidge*, 83 S. W. 333, 335 (Sup. Ct. Ark.);
Illinois Central R. Co. v. *Bogard*, 27 So. 879, 880 (Sup. Ct. Miss.);
Rhymer v. *D. L. & W. R. R. Co.*, 27 Pa. Super. Ct. Rep. 345, 347 (Super. Ct. Pa.);
So. Pac. Co. v. *D'Arcais*, 64 S. W. Rep. 813, 14 (Ct. Civ. App. Texas);
Ft. Worth & D. C. Ry. Co. v. *Greathouse*, 17 S. W. 834, 837 (Sup. Ct. Texas);

Ruppel v. *Allegheny Valley R. R. Co.*,
167 Pa. 166; 31 Atl. Rep. 478;
Straus & Co. v. *Canadian Pacific Ry. Co.*,
254 N. Y. 407.

In *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 59 Colo. 125, one of the cases cited by the petitioner, the conflict in the State court decisions is referred to as follows:

> "There is a conflict in the authorities concerning the validity of this clause. Mississippi, Pennsylvania, Texas and Arkansas have held that such a stipulation is invalid for the reason that it would relieve the carrier from a part of its liability occasioned through its negligence. *Railroad* v. *Bogard*, 78 Miss. 11, 27 South. 879; *So. Pac. Co.* v. *D'Arcais*, 27 Tex. Civ. App. 57, 64 S. W. 813; *I. & G. N. Ry. Co.* v. *Anderson*, 3 Tex. Civ. App. 8, 21 S. W. 691; *Ruppel* v. *Allegheny Valley Ry. Co.*, 167 Pa. 166; *Rhymer* v. *D. L. & W. R. Co.*, 27 Pa. Super. Ct. 345; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21, 3 Ann. Cas. 582; vol. 4, Elliott on Railroad (2d Ed.), sec. 1510a; vol. 1, Hutchinson on Carriers (3d Ed.), sec. 430."

The District Court and the petitioner cite a number of State Court decisions as supporting the contrary view. Apparently some of these cases do support valuation clauses (where the valuation applies to the damaged goods and not to the entire shipment) without a choice of rates. These cases must be examined with considerable care, however, as in some of them it is not at all clear whether or not a choice of rates was in fact given, or whether that question was considered material.

The decisions in the State of New York are particularly interesting. In *Kilthau* v. *Int. Mercantile Marine Co.*, 245 N. Y. 361, the New York Court of Appeals declared that a clause limiting recovery to invoice value, without a choice of rates, was void. In the course of its opinion, however, the court said:

> "If the parties here had agreed that such invoice value should be the basis for fixing damages in all cases, it might perhaps be said that the valuation and consequent limitation was not arbitrary and should be enforced."

When the question actually came up for decision, however, the court held that a clause which made the value at point of shipment the basis of adjustment, as distinguished from a mere limit of recovery, was void in the absence of a choice of rates. In *Straus & Co.* v. *Can. Pac. Ry. Co.*, 254 N. Y. 407 (decided in 1930), the bill of lading clause was as follows (p. 415):

> "All claims for loss of or damage or injury to any goods or property for which the carriers are liable under the terms hereof *shall be adjusted upon the basis of the market value of the said goods or property or of goods or property of the same nature and quality at the place and time of original shipment* unless the invoice or declared value of the said goods or property shall be less than such market value, in which case such invoice or declared value (whichever shall be the less) shall be the maximum, provided, however, that in no case shall the carriers be liable for or in respect of the said goods or property beyond the sum of $10.00 per cubic foot nor in any case exceeding $100.00 for any one package, or any article not enclosed in a package unless a higher value

> shall have been declared in writing at the time of shipment and *ad valorem* freight paid thereon." (Italics ours.)

The court said (p. 416):

> "The bill of lading does not state the value of the silk. The attempt to arbitrarily limit liability—to the value of the silk at the time and place of shipment in the event that the value was declared and an ad valorem rate paid, and otherwise to $100 per package—was without consideration. Under the wording of the bill of lading, *the shipper could not, in any event, recover more than the value of the goods at the time and place of shipment, even though it placed a higher valuation thereon and paid an ad valorem rate. Such attempted absolute limitation of liability, regardless of the rate paid, makes the clause void.*" (Italics ours.)

The decision in the *Straus* case was unanimous. The Bench included Mr. Justice Cardozo, of this Court, then Chief Justice of the New York Court of Appeals. With respect to this decision the District Court, in the present case, said:

> "I have not overlooked *Straus* v. *Canadian Pacific R. Co.*, 254 N. Y. 407. That case seems to support the libellant's argument, but it is opposed to the great weight of authority" (R., p. 184).

In connection with the New York decisions, it is interesting to note that the intimation above quoted from the *Kilthau* case appears to have been the basis of a similar but somewhat fainter intimation in the case of *The Merauke*, 31 F. (2d) 974, 975, upon which the petitioner relies (R., p. 195). We think it is a

fair assumption that the Circuit Court of Appeals for the Second Circuit would attach at least as great weight to the decision in the *Straus* case as they attached to the intimation in the *Kilthau* case.

POINT IV.

The question presented here is not one of degree. The contract upon which the petitioner relies is lacking in the element of free choice which this Court has held essential to such agreements.

The petitioner argues that Clause 11 is reasonable, and based on adequate consideration. True, the consideration is not the same which this Court has approved in earlier cases (*i. e.* a choice of rates); but, the petitioner says, it is just as good or even better. In some cases the consignee may get less than his actual commercial loss, and in some cases nothing, as in the present case; but in other cases he may get more,—a veritable wind-fall. Thus, the petitioner says:

> "At most, however, the only exemption the contract could be said to provide for was an exemption from payment of *fortuitous profits* that might result from market fluctuation during transit, and for that exemption it gave the shipper compensating protection against *fortuitous losses* resulting from the same cause. Why should not carrier and shipper be free to enter into such a contract? What interest of the public is served in refusal to enforce it? This is not a case where any unfair advantage has been taken of the shipper. It knew the terms of the contract of carriage, assented to them and signed the contract. It made no protest against its terms at the time of shipment or subse-

> quently prior to delivery of the goods. It not only did not protest the terms of shipment, but also presumably was satisfied with, and glad to avail itself of, the protection afforded it thereby" (Petitioner's Brief, p. 42).

Some shippers, of course, may only want the assurance of collecting their actual damages, and may not be willing to wager this right against a chance of collecting something to which they have no legal or moral claim. They may think, like the court which decided the *Ruppel* case (*supra*, pp. 9-10), that the odds are too strongly in favor of the carrier. They may prefer to take their own precautions against an adverse market, and look to the carrier only for the performance of his proper duties as such. With these conservative ideas the petitioner evidently has little patience. It refers to this respondent in terms which would be more suitable if applied to the patron of a gambling-house, who had stopped payment on the check given for his losses. We quote from the petitioner's brief (p. 44):

> "To allow him to avoid the contract when the event of shipment shows it to have been to his advantage to do so, a contract entered into without protest of any kind by him at the time of, or subsequent to, shipment, is, it would seem, *to reward him for a form of duplicity or deceit, and the only interest served that of his cupidity.*" (Italics ours.)

The answer to this argument is that it rests upon a false assumption. It assumes that Clause 11 is an agreement freely entered into by parties standing on an equal footing. The fallacy of this assumption was pointed out by this Court many years ago in *Railroad*

Co. v. *Lockwood, supra.* We quote from the opinion in that case:

> "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business.
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> * * * * * * *
>
> "If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept." (17 Wall. (U. S.) 379.)

The foregoing language applies with peculiar force to the present case. The bills of lading are in English (O. R., pp. 139-145); they were issued in Italian ports to Italian shippers, who probably could not have read

them even if they had thought of doing so. To read the document would be useless in any event, for they had no alternative but to accept it.

The language above quoted from the *Lockwood* case gives the background of the doctrine announced in that case and so clearly restated in *Union Pacific R. Co.* v. *Burke*, *supra*. Valuation clauses are upheld not merely because they are reasonable but because the shippers, in the exercise of a free choice, have agreed to them, and by representing that their goods have a certain value have estopped themselves from claiming a greater value. This Court has never undertaken to say how much, or on what consideration, a common carrier may cut down his common-law liability for damage due to his own negligence. On the contrary, this Court has held common carriers strictly to their common-law liability for their own negligence, recognizing that valuation clauses are an exception which can be sustained only on the ground that the shipper has a free choice in the matter. In the cases where valuation clauses have been upheld, it was the shipper, not the court, who decided that the clause was reasonable; and having made his choice, freely and voluntarily, he was estopped to take an inconsistent position later.

> "Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception." (*Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 322-3.)

In the present case the basis for an estoppel is wholly lacking. The shipper made no representation

and had no choice in the matter. Under these circumstances the question whether Clause 11 is reasonable does not arise. It is void because it cuts down the petitioner's liability for its own negligence.

POINT V.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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